Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	File No.: EB-10-TC-478
	)	
National Employee Benefits Group	)	NAL/Acct. No.: 201232170005
	)	
Apparent Liability for Forfeiture	)	FRN: 0021538509
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 28, 2012 **Released: February 29, 2012**

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that National Employee Benefits Group[1] apparently willfully and repeatedly violated section 227(b)(1)(C) of the Communications Act of 1934, as amended (the Communications Act or Act), and section 64.1200(a)(3) of the Commission's rules, by sending 97 unsolicited advertisements, or "junk faxes," to the telephone facsimile machines of 79 consumers.[2] Based on the facts and circumstances surrounding these apparent violations, we find that National Employee Benefits Group is apparently liable for a forfeiture in the amount of $603,000.

II. BACKGROUND

2. The Telephone Consumer Protection Act of 1991 (TCPA) was enacted by Congress to address problems of abusive telemarketing, including junk faxes.[3] Unsolicited faxes often impose unwanted burdens on the called party, including costs of paper and ink, and making fax machines unavailable for legitimate business messages. Section 227(b)(1)(C) of the Act thus makes it "unlawful for any person within the United States, or any person outside the United States if the recipient is within the

[1] According to publicly available information, Tim Gibbons is listed as the president and contact person of National Employee Benefits Group. All references in this NAL to National Employee Benefits Group also encompass the foregoing individual, as well as the corporate entity itself. Moreover, we note that National Employee Benefits Group appears to be related to Benchmark Mortgage, in that Benchmark Mortgage manages and oversees the financial programs and portfolios of the National Employee Benefits Group, and both entities share Mr. Gibbons as a point of contact, as well as the same physical address. *See The Employee Benefits Group: Important Notice to All Homeowners*, Benchmarkmortgagebank.com, http://www.benchmarkmortgagebank.com/national_employee_benefits_group (last visited Jan. 23, 2012).

[2] *See* 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006).

[3] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (*codified at* 47 U.S.C. § 227). *See also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

United States . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement…"[4]

3. On October 22, 2010, in response to a consumer complaint alleging that National Employee Benefits Group had faxed an unsolicited advertisement, the Enforcement Bureau (Bureau) issued a citation to National Employee Benefits Group pursuant to section 503(b)(5) of the Act.[5] The Bureau cited National Employee Benefits Group for using a telephone facsimile machine, computer, or other device, to send an unsolicited advertisement for financial services to a telephone facsimile machine in violation of section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of the Commission's rules.[6] The citation informed National Employee Benefits Group that within 30 days of the date of the citation, it could either request an interview with Commission staff, or provide a written statement responding to the citation. National Employee Benefits Group did not respond.[7]

4. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, we have received additional consumer complaints indicating that National Employee Benefits Group continued to send unsolicited facsimiles after the date of the citation.[8] This NAL is based on complaints filed by 79 consumers establishing that National Employee Benefits Group continued to send 97 unsolicited advertisements to telephone facsimile machines between March 1, 2011 and August 24, 2011.[9]

III. DISCUSSION

A. Apparent Violations of Section 227(b)(1)(C) of the Act and the Commission's Rules Restricting Unsolicited Facsimile Advertisements

5. Each of the consumers listed in the Appendix has provided evidence that National Employee Benefits Group used a telephone facsimile machine, computer, or other device to send the consumer at least one unsolicited advertisement. The facsimile transmissions at issue advertise financial services. The faxes therefore fall within the definition of an "unsolicited advertisement."[10] Further,

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[4] 47 U.S.C. § 227(b)(1)(C). The prohibition is subject to certain exceptions, such as if the sender has an "established business relationship" (EBR) with the recipient, and the sender obtained the facsimile number from the recipient through voluntary communication in the context of an EBR, or from a directory, advertisement, or website on which the recipient voluntarily made its facsimile number available for public distribution. In addition, the unsolicited ad must notify the recipient of how to opt out of receiving future such ads, subject to certain requirements. The Commission has adopted implementing rules. *See* 47 C.F.R. § 64.1200(a)(3).

[5] *See* 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to persons who do not hold a license, permit, certificate or other authorization issued by the Commission, or who are not applicants for any of those listed instrumentalities, for violations of the Act, the Commission's rules, or the Commission's orders).

[6] Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-10-TC-478, issued to National Employee Benefits Group on October 22, 2010.

[7] Our records indicate that National Employee Benefits Group acknowledged receipt of the citation, as evidenced by a signed United States Postal Service return receipt, Article Number 7008 0500 0000 9339 3528.

[8] *See* Appendix for a listing of the consumer complaints against National Employee Benefits Group requesting Commission action.

[9] We note that evidence of additional instances of unlawful conduct by National Employee Benefits Group may form the basis of subsequent enforcement action.

[10] *See* 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(13). The term "unsolicited advertisement" means "any material advertising the commercial availability or quality of any property, goods, or services, which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." *Id.*

according to the complaints, none of the consumers had an "established business relationship" with National Employee Benefits Group, which would have authorized the company to send the faxes to the consumer,[11] and none of the complainants gave National Employee Benefits Group permission to send the facsimile transmissions. Based on the record before us, we conclude that National Employee Benefits Group apparently violated section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of the Commission's rules by sending 97 unsolicited advertisements to 79 consumers' facsimile machines.

B. Proposed Forfeiture

6. After we have first issued a citation to an entity, as we have in this case, section 503(b) of the Act authorizes the Commission to propose a forfeiture for each subsequent violation of the Act, or of any rule, regulation, or order issued by the Commission under the Act.[12] Section 503(b)(2)(E) mandates that, "[i]n determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[13] Our forfeiture guidelines set forth the base amount for penalties for certain kinds of violations, and identify criteria, consistent with the section 503(b)(2)(E) factors, that may influence whether we adjust the base amount downward or upward.[14] For example, we may adjust a penalty upward for "[e]gregious misconduct," an "[i]ntentional violation," or where the subject of an enforcement action has engaged in "[p]rior violations of any FCC requirements" or a "[r]epeated or continuous violation."[15] Currently, the maximum penalty that the Commission may impose against an entity such as National Employee Benefits Group is $16,000 per violation.[16]

7. The Commission has generally considered $4,500 per unsolicited fax advertisement to be an appropriate base amount for violating the prohibition against sending them.[17] In addition, where the consumer requests that the company stop sending facsimile messages, and the company continues to do so, the Commission has previously considered $10,000 per unsolicited fax advertisement the appropriate

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[11] *See* 47 C.F.R. § 64.1200(a)(3)(i).

[12] 47 U.S.C. § 503(b)(5).

[13] 47 U.S.C. § 503(b)(2)(E).

[14] 47 C.F.R. § 1.80(b)(4) note. The absence of a particular type of violation from the forfeiture guidelines must "not be taken to mean that the violation is unimportant or nonexistent," and "the Commission retains discretion to impose forfeitures for other violations." *Commission's Forfeiture Policy Statement*, Report & Order, 12 FCC Rcd 17087, 17110 (1997).

[15] 47 C.F.R. § 1.80(b)(4) note.

[16] 47 U.S.C. § 503(b)(2)(C). Section 503(b)(2)(C) provides for forfeitures of up to $10,000 for each violation by an entity such as National Employee Benefits Group. *See* 47 U.S.C. § 503(b)(2)(C). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) first to $11,000 and more recently to $16,000. *See* 47 C.F.R. §1.80(b)(3). *See also Amendment of Section 1.80(b) of the Commission's Rules, Adjustment of Forfeiture Maxima to Reflect Inflation,* 23 FCC Rcd 9845 (2008) (amendment of section 1.80(b) to reflect an increase in the maximum forfeiture for this type of violator to $16,000).

[17] *See Get-Aways, Inc.,* Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 1805 (1999); *Get-Aways, Inc.,* Forfeiture Order, 15 FCC Rcd 4843 (2000). *See also US Notary, Inc.,* Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16999 (2000); *US Notary, Inc.,* Forfeiture Order, 16 FCC Rcd 18398 (2001); *Tri-Star Marketing, Inc.,* Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 11295 (2000); *Tri-Star Marketing, Inc.,* Forfeiture Order, 15 FCC Rcd 23198 (2000).

forfeiture for such egregious violations.[18] Consistent with this approach, we apply the $4,500 base forfeiture to 94 of the apparent violations at issue in this NAL and a $10,000 forfeiture for three of the apparent violations in this NAL where the consumer received a facsimile from National Employee Benefits Group after specifically requesting that National Employee Benefits Group cease sending them. Based on the application of these standards, National Employee Benefits Group is apparently liable for a base forfeiture of $453,000.

8. Recently, we have begun to impose upward adjustments for multiple, repeated violations of our junk fax rules. The amount of these upward adjustments has varied according to the number of violations at issue, and has ranged from $50,000 (40 violations)[19] to $150,000 (approximately 100 violations).[20] Given that this case also involves approximately 100 violations, we propose to apply a $150,000 upward adjustment, for a total proposed forfeiture of $603,000.[21] ($453,000 + $150,000 = $603,000) As we explained in the prior case where we proposed a $150,000 upward adjustment against an entity that had engaged in a total of over 100 violations, the magnitude of this adjustment is based on the fact that "[a]ll of the apparent violations, except those that formed the basis of the original citation, occurred *after* the Bureau first warned [the company] that its conduct violated the law…. The penalty that we proposed must take into account, in the language of section 503(b)(2)(E), this 'degree of culpability,' and 'history of prior offenses,' and in the language of the forfeiture guidelines, such 'intentional misconduct' and 'prior violations of … FCC requirements.'"[22] This reasoning is equally applicable here.

IV. CONCLUSION

9. We have determined that National Employee Benefits Group apparently violated section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of the Commission's rules, by using a telephone facsimile machine, computer, or other device to send 97 unsolicited advertisements to the 79 consumers identified in the Appendix. We have further determined that National Employee Benefits Group is apparently liable for a forfeiture in the amount of $603,000.

V. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that National Employee Benefits Group is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of $603,000 for willful and repeated violations of section 227(b)(1)(C) of the Communications Act, 47 U.S.C. § 227(b)(1)(C), and section 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3).

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[18] *See Carolina Liquidators, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16,837, 16,842 (2000); *21st Century Fax(es) Ltd., AKA 20th Century Fax(es)*, 15 FCC Rcd 24,406, 24,411 (2000).

[19] *See Laser Technologies*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 10792 (2011).

[20] *Presidential Who's Who*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8989 (2011) (*Presidential Who's Who NAL*). Since beginning to adjust the forfeiture upward for multiple, repeated violations of our junk fax rules, we have also proposed an adjustment of $75,000 for 62 violations. *The Street Map Company*, Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 8318 (2011).

[21] The upward adjustment of $150,000 amounts to approximately $1,595 for each of the 94 apparent violations at issue in this NAL that are not already subject to upward adjustment (*i.e.*, all of the violations except the three for which we assess a $10,000 penalty). The combination of the base forfeiture and the upward adjustment for each of the 94 violations is therefore approximately $6,095.

[22] *Presidential Who's Who NAL*, 26 FCC Rcd at 8994.

11. **IT IS FURTHER ORDERED THAT**, pursuant to section 1.80 of the Commission's rules,[23] within thirty (30) calendar days of the release date of this *Notice of Apparent Liability for Forfeiture*, National Employee Benefits Group **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

12. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). National Employee Benefits Group shall also send electronic notification on the date said payment is made to Johnny.Drake@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, SW, Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

13. The response, if any, must be mailed both to: Marlene H. Dortch, Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division; and to Richard A. Hindman, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, and must include the NAL/Acct. No. referenced in the caption. Documents sent by overnight mail (*other than* United States Postal Service Express Mail) must be addressed to: Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. Hand or messenger-delivered mail should be directed, without envelopes, to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, DC 20554 (deliveries accepted Monday through Friday 8:00 a.m. to 7:00 p.m. only). See www.fcc.gov/osec/guidelines.html for further instructions on FCC filing addresses.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

[23] 47 C.F.R. § 1.80.

15. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested and First Class mail to National Employee Benefits Group, Attn: Tim Gibbons, President, 795 Folsom Street, 1st Floor, San Francisco, CA 94107; and National Employee Benefits Group, Attn: Tim Gibbons, President, 1560 Youd Road, Winton, CA 95388.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Complainants and Apparent Violation Dates

Complainant received facsimile solicitations	Violation Date(s)
Armstrong, A.	3/1/11
Barrett, S.	6/21/11
Berman, A.	3/2/11
Beck, J.	5/10/11
Becker, K.	6/15/11
Bell, T.	5/24/11
Benefield, R.	5/23/11, 6/20/11
Botnick, B.	5/31/11
Can, V.	7/18/11
Cantrell, P.	6/21/11
Chase, D.	3/16/11
Chafey, T.	3/4/11
Cheifetz, A.	3/2/11
Coleman, M.	3/7/11
Cooper, J.	7/19/11
Copperman, H.	3/5/11
Dean, R.	4/18/11
DeLong, J.	3/1/11, 4/19/11, 7/25/11, 8/24/11
Eliopoulos, S.	4/25/11
Field, D.	5/9/11
Fletcher, D.	5/31/11
Gelbard, A.	7/18/11
Graham, S.	7/18/11
Grout, S.	3/23/11
Gubnitsky, M.	3/23/11, 4/11/11
Hartglass, L.	3/2/11
Haskell, J.	4/25/11
Heddy, R.	6/1/11
Higgins, D.	6/16/11
Highcove, J.	3/8/11, 4/21/11, 5/31/11
Hudkins, J.	4/19/11, 5/26/11, 7/25/11
Humphreys, D.	6/15/11
Jensen, G.	3/28/11, 6/3/11
Johnson, W.	5/16/11
Ko, A.	5/9/11
Korver, A.	3/23/11
Kressman, D.	6/9/11
Kunin, M.	5/11/11
Lavado, H.	3/4/11, 6/27/11
Longo, R.	3/16/11, 6/9/11
MacIntyre, A.	4/27/11, 8/2/11
McCarthy, T.	3/9/11
McCracken, A.	3/16/11
McFate, P.	3/28/11
Montgomery, R.	6/30/11

Newberg, B.	4/28/11, 6/14/11, 8/8/11
Ogle, J.	6/27/11
Oliveira, B.	6/21/11
Orlaski, S.	5/9/11
Ostroff, E.	5/12/11
Page, B.	3/4/11, 5/16/11
Pappas, H.	7/18/11
Peoples, L.	4/18/11, 6/1/11
Rader, M.	6/14/11
Richard, R.	4/11/11
Robbins, V.	6/1/11
Russell, B.	6/30/11
Schaffer, M.	3/8/11
Schroeder, J.	5/24/11
Sosnowitz, B.	5/12/11
Sherman, M.	3/2/11, 6/20/11
Smith, W.	3/4/11
Stainbrook, C. (Premium Industrial Parts)	3/21/11
Swearingen, V.	3/16/11
Tanenbaum, M.	5/23/11
Toglia, P.	3/31/11
Turner, A.	6/6/11
Traves, S.	5/26/11
Walker, S.	7/19/11
Walter, B.	7/21/11
Williams, G.	9/22/11
Wismer, R.	3/16/11
Woods, A.	6/3/11
Worthington, B.	8/3/11
Zelik, J.	4/5/11
Zieten, P.	3/2/11

Complainant received facsimile solicitations after requesting no more be sent	**Violation Date(s)**
Cho, S.	7/13/11
Izumi, J.	7/25/11
Jacobs, L.	5/23/11